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July 17, 2009

E-File

**The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001**

**Re: STB Finance Docket No. 35164, BNSF Railway Company –
Petition For Declaratory Order
STB Docket No. AB-6 (Sub-No. 430X), BNSF Railway Company –
Abandonment Exemption – In Oklahoma County, OK**

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Dear Acting Secretary Quinlan:

**Attached for e-filing is BNSF Railway Company's Motion to Strike
Comments of Oklahomans For New Transportation Alternatives Coalition.**

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

STB DOCKET NO. AB-6 (SUB-NO. 430X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN OKLAHOMA
COUNTY, OK**

**MOTION TO STRIKE COMMENTS OF OKLAHOMANS FOR NEW TRANSPORTATION
ALTERNATIVES COALITION**

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**Attorneys for:
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Dated: July 17, 2009

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35164

BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER

STB DOCKET NO. AB-6 (SUB-NO. 430X)

BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN OKLAHOMA
COUNTY, OK

MOTION TO STRIKE COMMENTS OF OKLAHOMANS FOR NEW TRANSPORTATION
ALTERNATIVES COALITION

By decision served on May 20, 2009, in these proceedings ("May 20 Decision"), the Surface Transportation Board ("Board") granted, in part, BNSF Railway Company's ("BNSF") petition for declaratory order and, on its own motion, granted BNSF exemptions from the provisions of 49 U.S.C. §§ 10903, 10904 and 10905 permitting BNSF to abandon the rail line located between mileposts 540.15 and 541.69 ("Line"). On June 8, 2009, John Kessler ("J. Kessler") filed a Petition for Reconsideration ("Petition").¹ BNSF replied to the Petition on June 26, 2009.

On June 29, 2009, Oklahomans For New Transportation Alternatives Coalition ("ONTRAC") filed comments in these proceedings ("Comments").

¹ By decision served June 12, 2009, in these proceedings, the Board denied J. Kessler's request that the Petition be treated as an appeal of right.

Pursuant to 49 C.F.R. § 1104.6, BNSF hereby moves the Board to strike the Comments as untimely. The May 20 Decision provided that petitions for reconsideration were due by June 9, 2009. Consequently the Comments were filed 20 days late. While the Board may, upon a showing of good cause, extend a filing deadline, ONTRAC has neither requested an extension nor has it demonstrated good cause for an extension.² In addition, the Comments seek to reintroduce the Verified Statement of Marion Hutchison which is virtually identical to the one filed by ONTRAC on February 11, 2009, in Finance Docket No. 35164.

Also, pursuant to 49 C.F.R. § 1104.8, the Board may strike any redundant, irrelevant, immaterial, impertinent, or scandalous matters. The Comments qualify on virtually all counts. ONTRAC and virtually all of the other individuals and entities that have made filings in these proceedings are opposed to a highway project in Oklahoma City, OK. Not one rail shipper opposes the abandonment or relocation of the Line. Nor have any actual shippers complained about degraded rail service as a result of the rerouting of traffic over the Packingtown Lead. The only opposition to the abandonment and relocation of the Line has come from a few individuals and organizations that are stubbornly opposed to the highway project. During the last 5 years, these individuals and entities have made approximately 50 abusive and frivolous filings in these proceedings with the Board as well as additional filings in the United States District Court in Oklahoma, the United States Court of Appeals for the District of Columbia Circuit and the Corporation Commission of the State of Oklahoma. In addition to being abusive and frivolous, the filings are redundant, irrelevant, immaterial, impertinent and, collectively, scandalous and should be stricken as such.

² One cannot circumvent the deadline for filings by piggy-backing on filings of other parties.

In the event the Board does not strike the Comments, the relief requested should be summarily denied.

ONTRAC readily concedes that the information (or, more correctly, the disinformation) set forth in the Comments is redundant to that presented by ONTRAC in its February 11, 2009 filing.

Once again, ONTRAC claims that rerouting of overhead traffic over the Packingtown Lead is inferior to the routing over the Line. In support, ONTRAC attaches a Verified Statement and four photographs taken over six months ago. Even if Mr. Hutchison's representations are correct, it is patently erroneous to suggest that the two hour period is representative of routings over the Packingtown Lead.³ Mr. Hutchison has either not sought or failed to obtain any information as to why, on that single occasion, trains were standing for more than two hours. Clearly, there could be multiple reasons for such an occurrence.

ONTRAC's claimed delays on the Packingtown Lead are also without any knowledge as to cycle times prior to the rerouting. Without such knowledge, one could argue just as easily that cycle times are the same or have improved since the rerouting over the Packingtown Lead.

Moreover, the highway project has been delayed because of the conduct of ONTRAC and other individuals intent on derailing the project. This, in turn, has delayed the relocation of BNSF's eastern segment which, at times, has impeded fluid operations in the area. In other

³ Mr. Hutchison contends that the trains were delayed by more than two hours, but concedes that he was in the area for only 2 hours. He also claims to have had a conversation with an engineer employed by Stillwater Central Railroad, Inc. ("SLWC") who purportedly stated that there were frequent delays on the Packingtown Lead. Mr. Hutchison's contentions are highly suspect since there was no mention of his conversation with the engineer in his February Verified Statement. ONTRAC claims that this purported conversation is "new information". Comments at 4. The purported conversation, however took place well before the February Verified Statement. Also, if Mr. Hutchison had such a conversation, he would necessarily have been trespassing on an active rail line something a SLWC engineer most likely would not have condoned.

words, to the extent there have been any delays, the delays are attributable, at least in part, to the actions of ONTRAC and its cohorts.

In any event, the rerouting of overhead traffic to the Packingtown Lead is a matter within the discretion of the railroad and does not require Board approval, much less the approval of ONTRAC. *See, e.g., Futurex Industries, Inc. v. ICC*, 897 F.2d 866 (7th Circuit 1990); *People of State of Illinois v. ICC*, 698 F.2d 868, 873 (7th Cir. 1983) (“This policy reflects the well-established principle that the routing of overhead traffic and the selection of alternative routes for the handling of such traffic is a matter of managerial discretion.”); *Central Michigan Ry. Co. – Abandonment*, 7 I.C.C.2d 557 (1991); *Southern Pacific Transp. Co. – Abandonment*, 360 I.C.C. 138 (1979). Consequently, even if the Board had not exempted the abandonment of the Line, BNSF and SLWC could have rerouted the traffic over the Packingtown Lead.

Most importantly, not a single shipper has come forward to complain. The only complaints come from individuals who seek to use the Board to derail a highway project they do not like.

Finally, ONTRAC argues that BNSF should be required to prepare an Environmental Impact Statement (“EIS”). As previously noted the rerouting of overhead traffic is a matter within the discretion of the railroad and is not subject to Board approval. Consequently, no Board environmental review is required or appropriate. *See* 49 C.F.R. Part 1105. For the abandonment of the Line, BNSF prepared an Environmental Report and the Board issued an Environmental Assessment.

ONTRAC seeks to have the Board prepare an EIS for obvious reasons: ONTRAC would like to start all over again. According to ONTRAC, the lack of any shipper complaints should not deter the Board from reopening the abandonment proceeding and the lack of any

environmental issue should not inhibit the Board from preparing an EIS. **Fifty filings** by ONTRAC and its cohorts over a four year period is apparently not enough. ONTRAC would have the Board grant the parties opposed to the highway project another opportunity to file false information, fraudulent documents and filings containing forged signatures.

For all the foregoing reasons, BNSF respectfully urges the Board to strike the Comments. Alternatively, BNSF urges the Board to deny the relief requested.

Respectfully submitted,

A handwritten signature in cursive script, reading "Karl Morell", written over a horizontal line.

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Attorneys for:
BNSF Railway Company

Dated: July 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike has been served on all parties of record by first class mail this 17th day of July, 2009.


Karl Morell